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NO. A-152

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a need to clarify the standards for summary judgment in "pretext" employment discrimination cases in light of the Supreme Court's holding in St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742 (1993)?

2. At what point does a circuit court's affirmance without opinion of a district court decision which grossly ignores existing case law constitute a sufficient departure from the accepted and usual course of judicial proceedings so as to warrant the exercise of the Supreme Court's powers of supervision?

LIST OF ALL PARTIES

A list of all parties as required by Rule 14.1(b) is included in the caption.

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FOR THE THIRD CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on May 27, 1993.

OPINIONS BELOW

Summary judgment was granted in favor of the defendant by the district court, Civil Number 90-503 (D.C.N.J. August 5, 1992). The decision of the district court was affirmed without opinion, Nos. 92-5473 and 92-5497 (3rd. Cir. May 27, 1993), and a Petition for Rehearing was denied, Nos. 92-5473 and 92-5497 (3rd. Cir. July 13, 1993).

STATEMENT OF JURISDICTION

The final judgment of the court of appeals was entered on May 27, 1993. Petition for Rehearing was denied on July 13, 1993. On August 17, 1993 Justice Souter signed an order extending the time to file a petition for certiorari to and including October 22, 1993. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1):

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . ., sex, . . .;

Age Discrimination in Employment Act, 29 U.S.C. §623:

> It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

The Fair Labor Standards Act, 29 U.S.C. §206(d)(1) (The Equal Pay Act):

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within

> any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .
>
> United States Constitution,

Amendment XIV:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .
>
> New Jersey Law Against

Discrimination, N.J.S. 10:5-12:

> It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer, because of the . . ., age, . . ., [or] sex . . . of any individual, to refuse to hire or

> employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; . . . .

STATEMENT OF THE CASE[1]

Jurisdiction of the United States District Court for the District of New Jersey was invoked by the petitioner by the filing of her complaint on February 1, 1990 seeking damages for alleged violation of Title VII, 42 U.S.C. §2000e et seq., the A.D.E.A., 29 U.S.C. §621 et seq., the Equal Pay Act, 29 U.S.C. §206(d)(1), the due process clause of the Fourteenth Amendment, and various pendent

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[1] No trial was conducted of this matter, since the defense motion for summary judgment was granted in its entirety. Therefore, the Statement of the Case sets forth the Petitioner's factual contentions, consistent with those that were presented to the district court.

state claims. Jurisdiction was based upon 28 U.S.C. §1343; 42 U.S.C. §2000e, et seq.; 28 U.S.C. §§1391(b) and (c); and pursuant to the doctrine of pendent jurisdiction.

Dr. Lois Fisher ("Fisher") was hired by Rutgers University ("Rutgers") effective September 1, 1985 as a tenure-track Assistant Professor in the Department of Business Administration of the Faculty of Arts and Sciences--Newark ("FASN"). Her qualifications included a Ph.D., with major fields in Higher Education and Social and Organizational Psychology, received from the University of Chicago in August 1984; and a post-doctoral certificate in Business Administration from New York University, received in Summer 1985. During 1984-85, she taught part-time in the Department of Business Administration at FASN. Fisher

was born on February 22, 1932; at the time of her hire she was 53 years old. On June 15, 1988, Fisher was informed that she would not be reappointed for a second term.

Faculty employment at Rutgers is governed by written University regulations and policies and a collective bargaining agreement.

In Fisher's engagement letter, the Dean of FASN stated that University regulations required an evaluation for further reappointment in the second year of the three-year contract. Rutgers' standards for reappointing assistant professors differ from the standards utilized in granting tenure. Pursuant to Rutgers' policies, assistant professors will normally be reappointed for a second term if they have performed satisfactorily and if there is a

reasonable expectation that at the end of that period there will be an opportunity for further promotion if they are qualified.

Despite the plain language of her engagement, Rutgers unilaterally decided to consider Fisher's reappointment in March of 1988, which was the third year of her contract. Failure to evaluate Fisher in her second year was material in that she was evaluated by a much different departmental committee, and, in 1988, no department members who participated in Fisher's evaluation had a background in her specific field, which is management.

Rutgers' policy sets forth five criteria for reappointment. These are: Teaching Effectiveness, Scholarly/ Creative Activity, Research Accomplishments, Professional Activity,

and General Usefulness. The process for reappointment is also set forth in University Regulations and in annual Instructions issued thereunder. Reappointments are acted upon by the candidate's department and separately by the department chair, independently by the FASN Appointments and Promotions Committee ("A&P Committee"), by the Dean of FASN, and by the Provost of the Newark campus, in that order. The Instructions require specific ratings on each criterion and justification for the ratings--all on prescribed forms.

There were numerous procedural errors in Fisher's reappointment evaluation and substantive errors in her reappointment packet. The department's negative evaluation of Fisher rested on its assessment of the quantity and quality of Fisher's publications as

inadequate and not in "our field." These reasons were untrue in themselves and untrue when compared to the records of the younger male candidates, who were reappointed both in 1987 and 1988 at FASN and at the Graduate School of Management ("GSM") at Newark. Several of these candidates were reappointed with no publications and with nothing accepted for publication. In fact, Fisher's department rated the male departmental candidate (who was reappointed) higher than Fisher in publication, despite the fact that during his appointment period he had published only one article and had one in press, while Fisher published two--one of which was published during the evaluation process. Fisher's refereed publications and research were on management topics and accepted for presentation at the national Academy of

Management and at other refereed professional conferences.

In addition, the department reached false conclusions about the difficulty rating in student evaluations of Fisher's major course, failing to compare it with the difficulty rating of that of the previous department chair, who taught the course at the same time and received virtually identical ratings. It then grossly mischaracterized a memo that Fisher had written concerning means of helping poorly prepared students to say that Fisher thought her students, as a whole, were "very poorly prepared" and claimed to be puzzled by the supposed discrepancy.

Other instances of departmental bias include failure to mention the two peer-reviewed University Research Council grants that Fisher received for sole-

authored work, while mentioning those that the younger male candidate received for co-authored work, rating of Fisher lower than the younger male in professional activities on the basis of an equivalent narrative, and omitting Fisher's activities under General Usefulness.

In addition, Rutgers failed to follow its required procedures in evaluating Fisher. For example, the Department Chair failed to notify or convene all of the tenured faculty to participate in evaluating Fisher's reappointment packet. At the time Fisher's reappointment was considered, the Department had six tenured faculty members, but only three participated, although four were available and could have attended. One of the three was the new Department Chair, who voted with the

Department, rather than submitting a separate, independent evaluation, in direct violation of an University policy provision which explicitly prohibits such action.

The Department Chair also committed other abuses of process during Fisher's evaluation. For example, he asked Fisher for proof of certain information which he did not bother to verify with respect to the younger male candidate he evaluated and whom he claimed to have helped with his research. At the same time, he failed to ask Fisher about other items he later claimed the Department had needed.

Further, in direct violation of the Instructions, the Dean failed to fill out the required evaluation form on any of the reappointed candidates, completing it only on the two nonrecommended older, female candidates. His substitute memos

to the Provost on those recommended failed to include the required rating grid and failed to address each specific criterion on each candidate.

The departmental committee's negative recommendation was also inconsistent with Rutgers' view of Fisher up to that time. For example, just seven months before her reappointment was rejected, the Associate Dean and the prior Department Chair had recommended Fisher for an out of cycle salary increase, stating:

> She is actively engaged in a research effort. She has two articles published or accepted in refereed journals and has participated in numerous professional meetings as a presenter or discussant. We believe she is a serious prospect for eventually being tenured.

The increase, subsequently approved at all levels of the University, was granted in January 1988.

Indeed, Fisher was given no indication either before or after August of 1987 that her accomplishments were unsatisfactory, and the Dean of FASN could not recall any discussions with Fisher prior to April of 1988 in which he informed her that her scholarly activities were inadequate or that she was headed in the wrong direction.

Subsequent levels of review further poisoned the process. For example, the Dean falsely criticized Fisher's teaching performance and scholarly activity, while approving the reappointment of younger males whose research accomplishments were inferior and whose records were not entirely satisfactory. The Provost of the Newark campus, who claimed that satisfactory teaching effectiveness is a threshold element of reappointment, nonetheless approved the reappointment of

a younger male with below average ratings under teaching effectiveness criterion.

Statistical analysis indicated that Rutgers demonstrated a clear bias of favoritism towards younger male candidates. Dr. Orley Ashenfelter, Professor of Economics and Director of the Industrial Relations Section of Princeton University and the Editor of the American Economic Review, analyzed whether there is statistical evidence of discrimination in reappointments of assistant professors at FASN and at the Graduate School of Management in 1987 and 1988. Preliminary conclusions revealed that the average age of individuals who were not reappointed was higher than the average age of those who were and that the difference was unlikely to have arisen by chance. He also noted that women were less likely to be reappointed

than men, to a degree that was statistically significant.

Rutgers also treated Fisher in a discriminatory fashion in other areas. For example, Fisher's starting salary at FASN was the lowest of any tenure track assistant professor on the Newark campus who was appointed in 1985 and was lower than the salaries of younger males who did not have Ph.D. degrees and who were otherwise less qualified than she. Although she repeatedly expressed a desire to teach at GSM, her applications were consistently ignored or denied, and younger, less qualified males were eventually hired.

Fisher's attempts to utilize the contractual grievance procedure in her collective bargaining agreement were useless. Rutgers frustrated the process at every turn, delaying the approval of

Fisher's grievance statement, breaching the collective bargaining agreement by failing to file its reply within the contract limits, and by refusing to cooperate in convening a hearing panel in a timely manner, even after Fisher was removed from the payroll. More than one year after she had filed her grievance, Fisher had still received no hearing. After Fisher asserted that the grievance process was futile, Rutgers unilaterally declared the grievance withdrawn, without the approval of the grievance committee that had said it would hold matters in abeyance.

REASONS FOR GRANTING THE WRIT

I. IN THE AFTERMATH OF ST. MARY'S HONOR CENTER V. HICKS, IT IS NECESSARY FOR THE COURT TO CLARIFY THE STANDARDS FOR SUMMARY JUDGMENT IN "PRETEXT" EMPLOYMENT DISCRIMINATION CASES.

Although the 1986 summary judgment trilogy of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, 477 U.S. 242 (1986), and Matsushita Electric Industrial Corp. v. Zenith Radio, 477 U.S. 574 (1986) may have been consistent with the overall trend to pare the docket of the district courts, the expanded use of Rule 56 is not without cost, including, most importantly, the potential for the improvident loss of the constitutional or statutory right to a trial by jury.[2] In

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[2] See, Issacharoff and Loewenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73 (1990).

employment discrimination cases, in which burdens of production have traditionally shifted[3] and standards of proof have remained unsettled, the risk of abuse is especially great. In the instant case, the district court granted a defense motion for summary judgment on all counts, despite its determination that Fisher had established a prima facie case with respect to her claims of age and sex discrimination. This Court's recent decision in St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742 (1993) leaves in doubt the applicable standard for summary judgment in a "pretext" discrimination case, and the Court therefore needs to clarify (1) that the post-Hicks standard is no different from

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[3] See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

that regularly required by Rule 56; (2) that summary judgment for the defendant employer should rarely be granted once a prima facie case has been established; and (3) that, for the purposes of resisting a motion for summary judgment, evidence in support of the qualifications prong of the prima facie test and evidence of pretext may be identical. While there is textual support in Hicks for the proposition that "pretext-plus" may or may not be required for ultimate determination, it is not and should not be required to avoid the entry of summary judgment[4], recognizing that " . . . summary judgment has become the principal

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[4] For insight into the dangers of using pretext-plus as a standard for summary judgment, see Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases," 43 Hastings L.J. 59 (1991).

procedural battleground for employers seeking to avoid discrimination trials." Lanctot, 43 Hastings L.J. at 67, fn.38 (1991).[5]

In Hicks, the Court of Appeals[6] reversed a district court judgment[7] and found in favor of the plaintiff

> [b]ecause all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race. 970 F.2d at 492.

The Supreme Court, however, disagreed. Justice Scalia wrote:

> If . . . the defendant has succeeded

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[5] Citing Visser v. Packer Engineering Associates, Inc., 924 F.2d 655 (7th Cir. 1991).

[6] 970 F.2d 487 (8th Cir. 1992).

[7] 756 F. Supp. 1244 (E.D.Mo. 1991).

> in carrying its burden of production, the McDonnell Douglas framework -- with its presumptions and burdens -- is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in Burdine that to rebut the presumption "[t]he defendant need not persuade the Court that it was actually motivated by the proffered reasons." 450 U.S. at 254 [emphasis added]

Thus, once the defendant has made some "production," the ultimate question of intentional discrimination must be decided by "the trier of fact." 113 S.Ct. at 2749.

Since all employment discrimination claims are fact specific, "[o]nce a prima facie case is established either by the introduction of actual evidence or reliance on the McDonnell Douglas presumption, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the

merits . . . ." Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985). This is consistent with Rule 56 of the Federal Rules of Civil Procedure, which mandates that summary judgment may be granted only where the moving party can show the absence of genuine issues of material fact. The role of the court at the summary judgment stage is to determine if a genuine issue of material fact exists and not to weigh the evidence presented and determine the truth of the matter. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).[8]

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[8] The prevailing rule in the Third Circuit is articulated in the traditional way. In 1992, that court, reversing the entry of summary judgment by the same district court judge who decided the instant matter, held (1) that inferences from underlying facts "must be viewed in the light most favorable to the party opposing the motion;" (2) that "the non-movant's allegations must be taken as true, and when these assertions conflict with those of the movant, the former must receive the

The decisions below raise important issues in exactly this context. Unless this Court takes the opportunity to clarify now the standards for summary judgment in employment discrimination matters, abuses will persist. Since the central fact in such cases "is not a physical occurrence, but rather . . . state of mind," 113 S.Ct. at 2754, summary judgment is particularly inappropriate once it is determined that a prima facie case has been established. This much was recognized by the district court in this case. At oral argument,

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benefit of the doubt;" that (3) summary judgment may only be granted where "there is no issue as to any material fact;" and that (4) "conflicts of credibility should not be resolved on a hearing on the motion for Summary Judgment." Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1250 (3rd Cir. 1992), reh'g denied, 958 F.2d 1271 (3d Cir. 1992).

Judge Sarokin commented:

> What always troubles me on motions for summary judgment . . . is that pretext by its very nature of the claim raises a factual issue. Pretext usually means the plaintiff is claiming that the reasons being offered in this case by the evaluators are not the true reasons, and that seems to always suggest that there is a question of fact as to whether or not the reasons given are the true reasons or not.
>
> I don't know how you can determine that when all you have are affidavits and no opportunity for cross-examination.

The district court went on to describe its decision on the motion as a "close call."

However, the district court granted summary judgment by employing a different standard:

> Because plaintiff has not identified such "glaring inconsistencies" or other evidence that defendant's doubts about her were influenced by forbidden considerations, the Court concludes that Fisher has not provided evidence of pretext to

> create a triable issue. Although she carried her prima facie case, she has failed to produce any evidence on the basis of which a reasonable jury could reject defendant's proffered legitimate reasons for not reappointing her. Accordingly, Fisher's sex and age discrimination claims based on her non-reappointment at FASN will be dismissed.[9]

The district court repeatedly resolved disputed issues of fact, assessed credibility, and generally determined that the employer's proffered "legitimate" reasons for its decision were unrebutted by engaging in an exercise that amounted to nothing less than a weighing of the evidence. Despite the Third Circuit's view that "[t]he issue of the defendant's intent at the

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[9] For a discussion of the applicability of "glaring inconsistencies," see Point II, infra. See also, Bennun v. Rutgers State University, 941 F.2d 154 (3rd Cir. 1991), cert. denied, __ U.S. __, 112 S.Ct. 956 (1992).

time of the plaintiff's discharge is clearly a factual question," Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987), the district court clearly felt justified in a method of analysis that directly parallels that of the Court of Appeals in Hicks.

This Court's opinion in Hicks makes it clear that such an analysis was improper after a full hearing; it remains an open and unresolved question if such an analysis is permissible on a motion for summary judgment.

Because of the need to resolve this open and ambiguous question, and because the decisions below present an appropriate legal and factual framework for doing so, the Court should grant certiorari.

II. BY AFFIRMING THE LOWER COURT'S RULING WITHOUT ISSUING AN OPINION, THE THIRD CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The Legal Framework

The Third Circuit has enunciated recent, clear precedent which set out the standards to be applied in employment discrimination matters. See, Bennun v. Rutgers State University, 941 F.2d 154 (3rd Cir. 1991), cert. denied, __ U.S. __ 112 S.Ct. 956 (1992) and Ezold v. Wolf, Block, Schorr and Solis - Cohen, 983 F.2d 509 (3rd Cir. 1992), rehearing denied 983 F.2d 548 (3rd Cir. 1993).[10]

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[10] Although not an employment case, for insight into the Third Circuit's current view of summary judgment see Kreimer v. Bureau of Police for Town of Morris Town, 958 F.2d 1242 (3rd Cir. 1992) rehearing

On May 27, 1993, the Third Circuit affirmed the district court's entry of summary judgment with only an order of judgment, but with no opinion. However, the district court's dismissal cannot stand in light of Bennun, and the error is so clear as to require invoking the supervisory authority of the Supreme Court.[11]

In Bennun, in a bench trial, the Court held that an associate professor at FASN at Rutgers who had been denied promotion had successfully established that the reasons proffered by Rutgers for the denial were pretextual. The district court had engaged in a comparison of

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denied 958 F.2d 1271 (3rd Cir. 1993).

[11] Fisher's complaint was filed in February 1990, several months before the District Court's decision in Bennun.

Bennun's promotion packet and credentials to those of a non-Hispanic colleague in his department who was treated differently during the promotion process. That comparison revealed that Rutgers' proffered nondiscriminatory reason for failing to promote Bennun (the "poor quality and insufficient quantity of his research") was a pretext for Rutgers' discriminatory denial of promotion. Bennun at 177.

The Third Circuit squarely rejected Rutgers' contention that the district court could not look behind the bare assertions of non-discrimination and determined that the district court had "simply found Rutgers' reason 'unworthy of credence,'" 941 F.2d at 178 [citing McDonnell Douglas], and that it was the district court which had the

responsibility for "find[ing] facts and assess[ing] credibility." 941 F.2d at 179.

In the instant case, then, the district court erred twofold. First, it improperly acted as a trier of fact and assessor of credibility at the summary judgment stage rather than at trial[12]. Second, it deviated to such an extent from the Bennun analysis of comparative criteria as to render this extremely persuasive precedent meaningless, even though the district court had determined that Fisher had established a prima facie case. The Third Circuit, affirming without opinion, implicitly endorsed all aspects of the district court's holding.

This circumstance has created such

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[12] Fisher had properly invoked her right to a jury trial.

an injustice and represents such a deviation from settled case law that the Supreme Court should exercise its supervisory authority to assure Fisher's constitutional and statutory right to a trial by jury.

B. The Failure to Compare

A comparative analysis of Fisher's credentials against those of younger, equally or less-qualified males who were reappointed,[13] reveals glaring inconsistencies which are much more extreme than those found in Bennun.[14] In

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[13] The process for reappointment is not a contest among candidates. Each candidate is to be judged on his or her own merits, and all may be reappointed if qualified.

[14] The district court compared Rutgers' treatment of Bennum to its treatment of another candidate. It analyzed, inter alia, the quality and quantity of publication, ratings of teaching

particular, Fisher established that:

- The vast majority of Assistant Professors are reappointed. Fisher's overall record was satisfactory, which, according to University policy was sufficient for reappointment.

- During the period of her appointment, Fisher had published two articles, one of which was still in galley proof at the beginning of the

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effectiveness, peer evaluation, and usefulness. 941 F.2d at 177, 178. It considered differences in the treatment of candidates at various levels of the process, such as the Appointments and Promotions Committee. 941 F.2d at 179. In fact, notwithstanding Rutgers' contention that there was no basis for comparison, since Bennum was primarily a researcher and another candidate was primarily a teacher, the district court appropriately focused on the five criteria established by Rutgers, the same five criteria on which Fisher bases her comparative argument. 941 F.2d at 179.

The Third Circuit affirmed the district court's consideration of all of these comparisons as trier of fact. Certainly, in Fisher's case, the same comparisons raised issues of fact which the district court was not permitted to resolve at the summary judgment stage.

reappointment evaluation. Since his appointment at Rutgers, also in 1985, Professor Castelino, a younger male, had published only one article. Both Rutgers and the district court failed to acknowledge Fisher's second article, even though the record showed that it was published at the time of her review.

- Both of Fisher's articles were sole-authored, and should have been given more weight than Castelino's, which were co-authored.

- Fisher's articles were refereed, and should have been given more weight than the non-refereed publications of other candidates. Bennun, supra, 941 F.2d at 175, fn.11.

- Fisher's two publications were derived from her award-winning dissertation. Both articles that Castelino published during a prior appointment were derived from his dissertation. The fact that a publication is derived from a dissertation is not a negative evaluation factor, nor has Rutgers presented any evidence that it should be negative, except for its own, self-serving assertion. In reality,

publications derived from dissertations are common and expected. After the fact, the Dean of FASN "expected more articles derived from the dissertation".

- Rutgers argued that Fisher's publications were not in the field of management, ignoring both her Candidate's Statement, which showed that these publications were, and the fact that her papers were of such a high quality that they were refereed and accepted for presentation at the Academy of Management and elsewhere.

- The department used identical language to describe Fisher and Castelino's professional activities, but rated Fisher only "average" and Castelino "above average." The Provost's after-the-fact explanation for the department's rating was that most of Fisher's professional activities did not involve management organizations, contrary to the evidence in her reappointment packet which showed that the majority were, indeed, in the area of management.

- The district court attempted to show that Rutgers had expressed a "legitimate" preference for

Castelino's activities, thereby wrongfully giving the impression that a choice had to be made between the two candidates.

- The district court acknowledged grants received by Castelino, but joined Rutgers in ignoring the fact that Fisher had also received two highly competitive grants.

- The district court failed to consider the glaring inconsistencies in the teaching evaluations of Fisher, Castelino, and others, and the department misquoted a memo written by Fisher regarding student preparation and then improperly used the misquote against her. Fisher offered evidence that this invalid criticism negatively affected the evaluations of the Dean and the Provost.

- The department failed to report Fisher's Co-Chairmanship of the Business Division's Teaching Committee.

- The court ignored the effects of the various procedural errors committed by Rutgers in evaluating Fisher and others. These procedures were required by Rutgers own regulations and

by the collective bargaining contract.

In addition, Bennun, like Fisher, had demonstrated that during his review for promotion, Rutgers had violated its own policies, particularly regarding the make-up of the committees which reviewed his credentials and voted against his promotion, 941 F.2d at 162; and the Third Circuit held in both Bennun and in Roebuck v. Drexel Univer., 852 F.2d 715 (3d Cir. 1988), that the make-up of an evaluating committee is crucial, especially in cases where evidence shows that discriminatory evaluations can infect the ultimate decision. 852 F.2d at 727. Although Fisher presented evidence that Rutgers, in evaluating her credentials, violated its own policies regarding procedure and committee make-

up, it is unclear if this evidence was considered by the Third Circuit in deciding to affirm, since there is no opinion.

It is also unclear if the Third Circuit considered Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), reh'g denied, 983 F.2d 548 (3d Cir. 1993), or, if it did, the role which it played in its decision.[15] In Ezold, the Third Circuit affirmed the comparative analysis employed in Bennun, specifically holding that "glaring inconsistencies" between Bennun and another candidate had led to the conclusion that the reason articulated by Rutgers for denying Bennun's promotion

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[15] Ezold was decided after the Fisher appeal was filed, but before it was decided.

was a pretext. The inconsistencies in Fisher's case are even more glaring than those in Bennun.

C. The District Court's Improper Resolution of Facts

But most seriously, the district court repeatedly violated Rule 56 standards by determining issues of credibility and resolving genuine questions of material fact. For example, with respect to one of Fisher's claims that Rutgers had violated its internal policies, the district court found that "defendant's interpretation of the regulation is both credible and plausible . . . ."

Other specific instances of improper fact resolution, even in the face of Petitioner's sworn statements to the

contrary, by way of deposition testimony and certified answers to interrogatories, include:

- The district court concluded at Pa27 that Fisher had failed to produce any evidence upon which a reasonable jury could reject Rutgers' proffered legitimate reasons for not reappointing her. Rutgers argued, as it had in Bennun, 941 F.2d at 179, that "with regard to both quantity and quality of publication the candidate's credentials are clearly below average." However, Fisher presented evidence that, during the period of evaluation, she published more papers than many people who were reappointed at FASN and GSM. In fact, some people who were reappointed did not produce any publications. As to quality, Fisher produced a letter from the Dean of GSM nominating her for a national award based upon the quality of her work as well as evidence that she had won the award. Fisher's articles based on her dissertation were refereed (without identity of author), objectively affirming the quality of the work that Rutgers characterized as marginal at best.

- At Pa28, the district court found that Rutgers had proffered "unrebutted" legitimate reasons for inconsistencies in its treatment of Rutgers. Contrary to those conclusions, Rutgers reasons were squarely rebutted.

- The Court credited Rutgers' after-the-fact explanation rating Fisher lower in professional activities than Castelino, based upon an affidavit of the Provost which concluded that "all but two of plaintiff's professional activities involved higher education organizations rather than management organizations." (Pa30). Contrary to this assertion, Fisher's reappointment packet demonstrated that the majority of her activities were involved with management organizations.

- Fisher's department failed to give her credit for having received any grants, leading to the erroneous conclusion that she had received none. Rutgers attempted to downplay this serious omission with subsequent affidavits asserting that Castelino's grants were of greater significance because they were based upon faculty peer review. However, Fisher's

grants were also based upon faculty peer review. The district court credited Rutgers' assertion as a critical basis for its decision, Pa30-32 despite Fisher's proof that her second grant was in competition with all university faculty, while Castelino's grants were given by the Rutgers Business Coordinating Council for a co-authored work only. Rutgers presented no documents to support its contentions.

- Fisher demonstrated that Rutgers had failed to follow its own regulations. For example, the department chair failed to present a separate evaluation statement as required by the University Promotion instructions. However, the district court determined that Rutgers' interpretation of this regulation was "credible and plausible," Pa35-36, and rejected Fisher's interpretation, notwithstanding that, under the collective bargaining agreement, even a past practice may not supersede a written regulation. Despite Fisher's demonstration that this and other procedures were not followed, the district court deemed them "minor" and

ignored them (Pa28-32).

- The district court found at Pa39 that another candidate was reappointed with "fewer published articles." In fact, that candidate had no publications and had nothing accepted for publication.

- The district court misquoted Professor Ashenfelter's conclusions and discarded them without a hearing to assess his explanation of the statistics. Professor Ashenfelter's opinion and his explanatory letter were ignored, although unrebutted by any defense expert. However, the district court substituted its judgment for that of the expert (Pa42-49).

Thus, the district court erred twofold. First, it completely ignored the nearly identical analytical precedent of Bennun. Second, it completely and repeatedly ignored the clear direction of Rule 56, which prohibits the district court from resolving genuine issues of material fact. The overall, combined

effect of the district court's action was to depart so far from established judicial norms as to require the supervision of the Supreme Court in order to insure fundemental justice and to protect the Petitioner's constitutional and statutory right to a trial by jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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